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No. 144.

Sup. Ct. Exs. of Kretzinger for Appellees

Filed Feb. 12, 1901.

144

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

B. F. THOMPSON, *Appellant,*

vs.

D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*

Appeal from the Supreme Court of the Territory of Arizona.

SUPPLEMENTAL BRIEF FOR APPELLEES PREPARED AFTER SERVICE OF COPY OF BRIEF FILED IN BEHALF OF APPELLANT.

G. W. KRETZINGER,
SOLICITOR FOR APPELLEES.

BARNARD & MILLER PRINT, CHICAGO.

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Supreme Court of the United States,

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B. F. THOMPSON, *Appellant,* vs. D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*	Appeal from the Supreme Court of the Territory of Arizona.

Supplemental Brief for Appellees prepared after service of copy of brief filed in behalf of Appellant.

MAY IT PLEASE THIS HONORABLE COURT:

Since the dictation and filing of our former brief in behalf of the appellees, we have seen for the first time the argument filed in behalf of appellant.

Touching the contentions there made for reversal of the judgment of the Supreme Court of the Territory, we beg leave briefly to submit:

I.

The learned counsel contends that the statute of limitation applied by the Supreme Court of Arizona is not applicable where the property involved is a mining claim.

For this contention no authority is cited.

Section 2,308 of the Revised Statutes of Arizona of 1887 seems to deprive the contention of all weight. It is there provided, in express words, that the words "real property" are to be "taken to mean mines and mining claims."

II.

The learned counsel further contends that the statute of limitations is inapplicable, because title by adverse possession under the statutes of Arizona can be acquired only to 160 acres; that this Honorable Court will take judicial notice that the two mining claims involved contain more than 160 acres. Counsel obviously misread the statute in making this contention. Section 2,300 of the Revised Statutes of Arizona distinctly provides that where possession is taken and held under a written memorandum of title other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be *co-extensive* with the boundaries specified in such instrument.

Here Dickey re-located these mining claims in his own name, and duly registered his location papers; he obtained a patent in his own name. All this occurred three years before the institution of this suit. He and his grantees held peaceable and adverse possession of the claims unquestionably under color of title. That possession cannot be disturbed unless suit is instituted within three years. (Sec. 2,297.)

Bicknell v. *Comstock*, 113 U. S., 149.

III.

The learned counsel further contends that the statute of limitations is inapplicable because the relation of trustee and *cestui que trust* existed between the appellant, Thompson, and Dickey and his grantees.

It may be conceded that the statute of limitations does not bar the enforcement of an express and formal trust, but this record conclusively shows that no trust relation ever existed between the appellees and their grantor and appellant. Dickey took under a deed of the entire property made by Lowry, administrator, to him on July 20, 1891. If, before that date, any relation of co-tenancy existed, that deed of the entire property by Lowry extinguished the relation. Dickey entered into full possession as sole owner co-extensive with his deed. His possession from the first was attended with an assertion of full ownership, and, as to Thompson, was *ab initio* openly adverse, hostile, and exclusive. As sole owner he re-located the entire property to both claims in his own name, posted and registered notices, publicly applied for a patent, and publicly received the patent to both claims. As sole owner he possessed, operated and developed the entire property. For more than ten years prior to this suit, appellant Thompson had no more to do with the property than an utter stranger. He exercised no right of ownership, shared no expense, served no notice, never had communication, relation or dealing with Dickey, to whom he was an utter stranger, in any form whatsoever. It is clear, therefore, that no recognized relation of co-tenancy and no express trust ever existed between Dickey and the appellant.

The suit of appellant is clearly one to establish a constructive trust, and to such a suit the statute of limitations is a complete bar.

Spidel v. *Henrici*, 120 U. S., 377.

Merrill v. *Monticello*, 66 Fed., 165, and authorities there cited.

But independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them.

Spidel v. *Henrici*, 120 U. S., 377.

IV.

The learned counsel contends that appellant had no notice that the possession of Dickey was adverse.

Both the District Court and the Supreme Court of Arizona found and concluded from the evidence that Thompson had both actual and constructive notice of the acts establishing the adverse character of the possession of Dickey and his grantees. Such knowledge may be derived from "actual notice or by acts or declarations so open and notorious that it may be inferred that the co. tenant had knowledge of them."

Unger v. *Mooney*, 63 Cal., 591.

V.

No authority cited by appellant affords reason for the reversal of this decree.

Zeller v. *Eckert*, 4How., 289, sustains our contention that the statute of limitations begins to run at the time the evidence raises an adverse possession (page 295), and the adverse possession is established by acts "*open, continued* and *notorious*, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owner."

Is it possible to imagine acts of adverse possession more "open, continued and notorious" than those which this record discloses?

In *Hunt* v. *Patchin*, 35 Fed., 816, there was no intimation that the defendant denied the existence of the relation of co-tenancy, and did nothing establishing the character of an adverse possession.

In *Mining Co.* v. *Taylor*, 100 U. S., 37, there was no adverse possession on the part of the co-tenant prior to the commencement of the two years, the limitations specified in the Nevada statute.

Moreover, in that case the plaintiff was a foreign corporation and therefore not entitled to the benefit of the Nevada statute of limitations.

It will be observed also that this Taylor case is a conclusive answer to the learned counsel's contention as to the inapplicability of the statute of limitations. There the court clearly holds that the statute begins to run as soon as the possession becomes openly adverse, as in the case at bar.

The point decided in *Turner* v. *Sawyer*, 150 U. S., 578, that the lienholder was nor a co-owner within the meaning of section 2,324 of the revised statutes, so as to entitle him to "advertise out" the other parties in interest, has no application to the case at bar.

In *McClaskey* v. *Barr*, 47 Fed., 154, it was held that the defendant was entirely without notice of any act on the part of his co-tenant indicative of an adverse or hostile possession.

The pertinent facts in *McClaskey* v. *Barr* are more fully stated in 42 Fed., 609, where the question of the statute of limitations was considered. It appears that the defendant never did anything "indicating a claim to the entire estate and intention to hold adversely," except to construct some improvements. But more than this, it appears that the recorded deeds to the defendants recognized the co-tenancy and subsequent deeds from the co-tenants to the defendants contained "recitals recognizing in express terms the co-tenancy." (p. 616.) In this situation the Circuit Court in that case properly concluded:

> "The admitted facts, as they appear from the pleadings, cannot be reconciled with the proposition that there has been an adverse possession so open, continued and notorious 'as to preclude all doubt of the character of the holding or the want of knowledge on the part of the owner,' which is what the Supreme Court in *Zeller's Lessee* v. *Eckert* declared to be necessary."

In the case at bar Dickey did everything that could be done indicative of a hostile and adverse possession, and of everything done appellant was cognizant.

Respectfully submitted.

G. W. KRETZINGER,
Solicitor for Appellees.